

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE WESTERN DISTRICT OF TEXAS

3 WACO DIVISION

4 FRESHUB, INC., AND FRESHUB, ) (  
LTD., ) (  
5 PLAINTIFFS, ) ( CIVIL ACTION NO.  
6 VS. ) ( 6:21-CV-00511-ADA  
WACO, TEXAS  
7 AMAZON.COM, INC., a DELAWARE ) (  
CORPORATION, AMAZON.COM ) (  
8 SERVICES LLC, a DELAWARE ) (  
LIMITED LIABILITY COMPANY, ) (  
9 AND WHOLE FOODS MARKET ) ( OCTOBER 19, 2021  
SERVICES, INC., a TEXAS ) ( 9:28 A.M.  
10 CORPORATION, ) (  
DEFENDANTS. ) (  
11

12 MOTIONS HEARING

13 BEFORE THE HONORABLE ALAN D ALBRIGHT

14 UNITED STATES DISTRICT JUDGE

15 FOR THE PLAINTIFFS: Mr. Paul J. Andre  
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25 (Proceedings recorded by mechanical stenography, transcript  
produced on a CAT system.)

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1 THE COURT: Good morning, everyone.

2 Katherine, if you'd call the case, please.

3 COURTROOM DEPUTY: Good morning, Judge.

4 Court calls Waco 6:21-CV-511, Freshub, Inc.,  
5 et al., versus Amazon.com -- .com, Inc., et al., for a  
6 Motion Hearing.

7 THE COURT: Mr. Andre, if you want to announce for  
8 Plaintiffs.

9 MR. ANDRE: Good morning, Your Honor. Paul Andre  
10 for Freshub. With me today is James Hannah, who will be  
11 arguing the Defendants' motion. I'll be arguing our  
12 motion. And, of course --

13 MR. HANNAH: Good morning, Your Honor.

14 MR. ANDRE: Of course, John Palmer is with us, as  
15 well.

16 THE COURT: And for Defense? Mr. Hadden, I see  
17 you.

18 MR. HADDEN: Good morning, Your Honor, Dave Hadden  
19 for Amazon. With me is my partner, Saina Shamilov, and  
20 also my colleague, Allen Wang. I will be arguing our  
21 motion and part of Freshub's motion on the JMOL.  
22 Ms. Shamilov will be arguing the new trial motion.

23 THE COURT: Okay.

24 MS. SHAMILOV: Good morning, Your Honor.

25 THE COURT: Good morning.

1 I'm happy to have -- Mr. Andre, we're going to  
2 start with y'all's motions.

3 MR. ANDRE: Thank you, Your Honor.

4 And let me start with saying how much I enjoy the  
5 jury system in the United States. We're the only country  
6 in the world that tries patent cases to a jury, and I am a  
7 huge advocate of the jury system.

8 But the jury system, obviously, relies upon both  
9 parties playing by the rules. And when they don't, the  
10 jury system can go awry. And that's what we're arguing in  
11 this case has happened.

12 We think that Amazon provided the jury with a lot  
13 of irrelevant and highly prejudicial, unfairly prejudicial  
14 material. They asked the jury to nullify the overwhelming  
15 facts of the case. They basically said that this case was  
16 an assault on not only U.S. companies but the U.S.  
17 Constitution itself.

18 And so with our motions for Rule 50, for the  
19 judgment as a matter of law, we're going to focus on three  
20 issues.

21 And, Your Honor, I'll share my screen so you can  
22 see the slides.

23 Can you see that okay?

24 THE COURT: Yes, sir, I can.

25 MR. ANDRE: Okay. Great.

1           So for the Rule 50 motion, we're going to focus on  
2 three independent reasons why the Court should enter a  
3 motion for judgment as a matter of law of infringement.

4           The first one is that the Defendants failed to  
5 rebut Freshub's infringement proofs, including they failed  
6 to address the infringement by Doctrine of Equivalents  
7 altogether. They didn't cross-examine our witness on it.  
8 They did not put forward any evidence whatsoever.

9           In this case, they -- the Defendants conceded the  
10 vast majority of the claim elements. There's no contest to  
11 those. The only thing they -- they contended were not  
12 there were the claim term "verbal order" and "item" of the  
13 patents.

14           For the '408, they also talked about the matching,  
15 but that was only half-hearted.

16           There was overwhelming evidence that we provided  
17 through our case-in-chief that every element was met. Our  
18 expert, Dr. Nenad Medvidovic, provided the testimony and  
19 ample evidence, both in the form of source code, testimony,  
20 the engineers, and confidential and public documents.

21           What was probably the most telling aspect of the  
22 infringement case was not only did our witness put forward  
23 the overwhelming evidence, but they put forward no really  
24 compelling opposition to the -- to the issue we talked  
25 about. We were able to refute those in our case-in-chief.

1           So that issue alone is enough for the Court to  
2 grant a motion for judgment as a matter of law.

3           Any one of these three would be enough. Probably  
4 the most powerful evidence that you -- the Court saw was  
5 when the Defendants' fact witness, Dr. Ström, actually  
6 admitted infringement. This was a -- one of their vice  
7 presidents, the man who developed the infringing  
8 technology, took the stand, and my partner, James Hannah,  
9 cross-examined him. And I -- I've cut and pasted the  
10 testimony that we provided to the Court on Pages 5 and 6 of  
11 our brief.

12           Now, we put this in, almost two pages of a chart  
13 on a 20-page JMOL, and that's very valuable real estate, as  
14 Your Court -- Your Honor knows. And I thought this was  
15 extremely important because this is admission by a party.  
16 This doesn't -- credibility doesn't factor into it. This  
17 is just a party admission. We put this in our brief. I  
18 used it in closing argument. And this is an actual  
19 admission of infringement on every single claim element.  
20 There's no ambiguity here.

21           In our brief, we put it on JMOL, Amazon didn't  
22 even address it in their opposition. They completely  
23 ignored these -- this chart on Pages 5 and 6 of our brief  
24 and the evidence cited therein. And I think that speaks  
25 volumes.

1           This is not an issue where the jury could weigh  
2     credibility, because it is a party admission. It's not one  
3     expert saying one thing and another expert saying another  
4     thing. This is just a straight out admission of  
5     infringement. And there's no ambiguity about those claim  
6     elements.

7           That issue alone is enough to grant JMOL as well,  
8     as well as the overwhelming evidence.

9           The third aspect or reason the Court should grant  
10    the JMOL is because their expert, Dr. Johnson, applied a  
11    special meaning to the claim terms. I cross-examined  
12    Dr. Johnson on this issue, and you can see on the slide,  
13    this was the testimony he provided. And I said very  
14    clear -- I said: Let me be very clear -- I said: Let me  
15    be very clear. When the patent claims a verbal order  
16    comprising at least one item -- I asked him: The word  
17    "verbal order" has special meaning, and you based your  
18    reading of the patents on that?

19           And he said: Sure. That's fine, yeah.

20           So he didn't use the Court's plain and ordinary  
21    meaning. He went to the specification and applied special  
22    meaning to them.

23           He did the same thing with the term "item."

24           When I asked him: You applied a special meaning  
25    to the term "item," you did not use the Court's plain and

1 ordinary meaning?

2 He said: Yeah, I did. I applied a special  
3 meaning based on his reading of the specification.

4 That's the third reason why the JMOL should be  
5 granted. Like I said, any one of those three would be more  
6 than sufficient to grant a JMOL.

7 So that leaves us with the -- the dilemma, why did  
8 the jury find non-infringement when the evidence was  
9 overwhelming, we had a party admission, and the fact that  
10 their expert -- I have testimony their expert didn't use  
11 the claim construction?

12 And the reason being is that the themes that were  
13 developed through the case -- and this was not just one  
14 time, this was throughout the entirety of the case, from  
15 the opening statement to the closing statement -- was that  
16 the Defendant developed a theme of "us versus them." They  
17 said: This is an assault on U.S. companies by a foreign  
18 entity. This is assault on the U.S. Constitution by a  
19 foreign entity.

20 And they played on biases of those foreign  
21 entities. And that's what they -- they based their whole  
22 case on because they did not have any adequate defenses to  
23 non-infringement or invalidity.

24 So that leads us to the reason why the jury would  
25 have found non-infringement, and it -- also the reason why



1 we're entitled to a motion for new trial.

2 The -- the theme of Defendants' whole case was  
3 "us versus them." And there are four independent bases for  
4 Defendants to use the "us versus them" theme.

5 One, they -- the Defendants pitted the community  
6 against a foreign company. They made it very clear that  
7 we're a foreign company coming after the U.S. companies.

8 Two, the Defendants encouraged the jury to make  
9 policy decisions --

10 THE COURT: Let me -- let me stop you there.

11 When -- when they allegedly pitted a company or  
12 community against a foreign company, when did you -- at  
13 what point did you object during the trial?

14 MR. ANDRE: We made multiple objections on  
15 relevancy grounds, and we also made a motion that they  
16 would not -- a motion in limine they would not bring in  
17 these type of disparaging issues. They would not be  
18 bringing in the fact that -- I mean, this was really  
19 highlighted in the closing argument. This is how they  
20 pulled it together. So --

21 THE COURT: Did you object during closing  
22 argument?

23 MR. ANDRE: No, Your Honor. I think as Your Honor  
24 is very well aware that during closing argument, it came --  
25 it hit very, very quickly. And after the fact, it would

1 have been -- well...

2 THE COURT: I don't remember a single time you  
3 objected on the basis that the Defendant was pitting a  
4 community against a foreign company, not once.

5 MR. ANDRE: Well, Your Honor, it was something --  
6 like I said, it came into the -- the closing argument. And  
7 you're right, I did not.

8 THE COURT: So -- so was -- during the course of  
9 the trial, was there any evidence where the Defendant  
10 pitted the community against a foreign company when they  
11 were putting on their evidence where you objected on the  
12 record to them doing that?

13 MR. ANDRE: Your Honor, we did make motions in  
14 limine that were -- and --

15 THE COURT: Mr. Andre, I'm going to ask one -- I'm  
16 going to ask you one more time.

17 MR. ANDRE: Yeah.

18 THE COURT: During the course of the trial, when  
19 you say the Defendant pitted the community against a  
20 foreign company, did you -- on behalf of your client, did  
21 you ever object? Because I don't remember you objecting.  
22 Had you done so, I'm sure I would have remembered it at  
23 least, and I certainly would have taken it seriously.

24 So you'll agree with me that on behalf of your  
25 client, you never objected during the course of the trial

1 when evidence was coming in; is that correct?

2 MR. ANDRE: Your Honor, I think that -- I would  
3 agree with that statement.

4 THE COURT: Okay.

5 MR. ANDRE: And I'll --

6 THE COURT: Now, during the closing argument,  
7 also, you didn't object, and you didn't ask me to say  
8 anything to the jury to try and alleviate the problem; is  
9 that correct?

10 MR. ANDRE: That's correct, Your Honor.

11 THE COURT: Okay. You can keep going on No. 2.

12 MR. ANDRE: Okay. Well, this was the part of the  
13 closing argument I was talking about, Your Honor, where it  
14 says, you know -- and one of the reasons it needs to stop  
15 is because we know this is the tip of the iceberg.

16 That's not me saying it, that's Mr. Zohar saying  
17 it. And we did object to that evidence, but it came in  
18 nonetheless.

19 Who comes next? Google, Apple, dot, dot, dot.  
20 Every U.S. technology company they can find. And that's  
21 why we're here. I can't stop it. Amazon can't stop it.  
22 Only you folks can stop it.

23 They're putting this out there that this was an  
24 attack on a U.S. company, and that was closing argument,  
25 and we did object to that testimony coming in from

1 Mr. Zohar.

2 THE COURT: But you did not -- you did not object  
3 during the closing argument?

4 MR. ANDRE: That's correct. The object -- the  
5 objection from Mr. Zohar's testimony -- we did object.  
6 That was overruled. And so when it came out in closing  
7 argument, I did not make that objection during closing  
8 argument, that's correct, Your Honor.

9 The second issue is that they sought to make  
10 jury -- make policy decisions on the U.S. patent system.  
11 And this was something that we raised on multiple grounds.  
12 They kept talking about how this is an attack on the U.S.  
13 patent system and the Constitution itself.

14 They said: This is the purpose of the U.S.  
15 Constitution, to ask you to go through and listen to the  
16 evidence in this case, ask yourself whether or not the  
17 process is really promoting science. The patent system was  
18 not set up for someone to file patents four or five years  
19 after someone else had already introduced them -- a product  
20 and attempted claim that you had a solution a decade ago  
21 when you really didn't.

22 Now, they're arguing that this type of  
23 information -- and this was the common theme throughout.  
24 They asked about -- so rather than doing it a normal way,  
25 hard work and innovation, we're going to go to the

1 courthouse. And that's why we're here, because this  
2 conduct needs to stop. This is not what the patent system  
3 was designed for. The preservation of the constitutional  
4 patent system and the integrity of it, it's a play. And  
5 this is not what it's about, and this needs to stop.

6 So they're saying that the jury had to stop this  
7 abuse of the United States Constitution.

8 THE COURT: They're -- they're saying that the  
9 jury has to stop companies from doing what they argued --  
10 and it's argument, it's not evidence. They argued that  
11 your company had gotten -- had filed for a patent in the  
12 2000s, and then after their product came out, your company  
13 went back and filed for a patent, knowing what the product  
14 was, and intentionally got a patent that read on a product  
15 that you -- that you were aware of. And that's not what  
16 the patent system is intended to do.

17 I don't have a problem with any of that argument.  
18 I have no problem with that argument. It's -- number one,  
19 it's argument. But, number two, it was completely  
20 consistent with exactly what your company did.

21 MR. ANDRE: Yeah, but, Your Honor --

22 THE COURT: Those were the facts.

23 MR. ANDRE: Yeah, it is the facts, Your Honor, and  
24 we don't -- we don't deny that. It is something that --  
25 does a company have a right to go back and do exactly as

1 you said? And if it does, is that abuse of the patent  
2 system?

3 They filed this patent in 2005. They got priority  
4 back to 2005. And this is a case -- Your Honor knows quite  
5 well how the patent system works, that continuation patents  
6 get filed all the time.

7 And the fact that these patents were filed years  
8 after Amazon released its product, it's not abuse of the  
9 patent system. That's how the patent system is designed to  
10 work. You don't have to go through and identify every  
11 single embodiment of the invention and the claims at the  
12 first -- your very first initial patent application.

13 So this is an example of irrelevant information,  
14 regardless whether it be true or not, that's what happened.  
15 For a jury, this biases them against it because it's not an  
16 assault on the constitution. It's not an assault on the  
17 patent system. This is exactly how the patent system is  
18 designed.

19 They continued on with this. They said: The  
20 patent system was not created to print patents. It was  
21 created to generate lawsuits. It was not -- it wasn't  
22 created to generate lawsuits. It was created to advance  
23 science.

24 Once again, this is irrelevant information. It  
25 has nothing to do whether there's infringement or validity

1 or damages. This is -- we played by the rules, and they  
2 said that we didn't. They said: It has to be of their own  
3 doing.

4 Then they also -- the Defendants also played on  
5 cultural stereotypes to bias the jury. This was something  
6 that we moved in limine to exclude this information by  
7 Mr. Zohar and Mr. Douer.

8 Now, in their opening statement, they mentioned  
9 that Mr. Zohar and Mr. Douer cooked up this plan to get  
10 rich. Now, the undertones of that cannot be denied. They  
11 made it very clear that this was a foreign company, an  
12 Israeli company that was coming to the United States. They  
13 were cooking up these two witness --

14 THE COURT: Where -- where does it -- no,  
15 you're -- you've got this dog whistle theory. Where does  
16 it say anything in here about an Israeli company coming in  
17 here to get rich?

18 MR. ANDRE: Well, when it says -- they made it  
19 clear before this that it was an Israeli company, and when  
20 they say that Mr. Zohar came with a plan in 2017, and his  
21 plan was cooked up with Mr. Douer --

22 THE COURT: Okay.

23 MR. ANDRE: And it says that they were trying to  
24 get rich --

25 THE COURT: Are you presuming that -- I have no

1 idea what ethnicity Mr. Zohar is or Mr. Douer. Are they --  
2 are they Jewish? I don't know. And -- but you're  
3 presuming a dog whistle here that because they used these  
4 names that it's racist?

5 MR. ANDRE: No, Your Honor, I'm not saying it's  
6 racist. I'm saying it's playing on cultural stereotypes.

7 THE COURT: No, racism, cultural ster -- whatever  
8 you want to call it. It's anti-Israel.

9 I don't see anything in here that has anything to  
10 do with anything that is ethnic or racial or anti-Israeli  
11 or anything. I don't see anything in here that's like  
12 that.

13 MR. ANDRE: Well, there was a series of questions  
14 about Mr. Douer, who was going stand to make over \$120  
15 million. This was a question of one of our witnesses.

16 THE COURT: Okay.

17 MR. ANDRE: Now, Mr. Douer was not a witness in  
18 this case.

19 THE COURT: Because he avoided service. And he  
20 wouldn't -- he intentionally -- he's the guy that wouldn't  
21 take service, right?

22 MR. ANDRE: That's correct.

23 THE COURT: And so he owns a hundred percent.  
24 He's going to make \$120 million, and he -- and he's not  
25 going to show up at trial. And he, in fact, avoided



1 getting -- having his deposition taken so they wouldn't  
2 have his testimony. And the reason he didn't want his  
3 testimony taken, in my opinion, it was pretty clear, was  
4 because of the concerns that you-all had that if he was  
5 asked about what he did in terms of the continuation  
6 patents and what existed back in the 2000s, those answers  
7 might not be very good for you.

8 But there's nothing in this that has anything to  
9 do with -- again, with anything that's of any ethnicity or  
10 racism or prejudice. There's nothing here.

11 MR. ANDRE: Your Honor, I don't know what  
12 relevance -- and there was a series of questions along this  
13 line. I won't go through --

14 THE COURT: You don't know what relevance it had  
15 to a person that owns 100 percent of the company and owns  
16 51 percent of the Plaintiff hid from being served and  
17 refused to come to trial, and he's going to make \$120  
18 million? You don't know what relevance that might have?

19 MR. ANDRE: Well, Your Honor, it's not relevant to  
20 whether or not Amazon infringes. It's not relevant --

21 THE COURT: It's -- it is totally relevant to  
22 the -- the main issue in the case, which was how did they  
23 go about getting this patent after they'd already seen the  
24 product? It was totally relevant.

25 And the fact that the person who -- the single

1 person who had that information made it impossible for  
2 himself to be deposed and would not come to trial was  
3 absolutely, absolutely relevant. And if it weren't,  
4 there's no objection here.

5 MR. ANDRE: Your Honor, we'd already moved in  
6 limine on this and lost.

7 THE COURT: I -- limine has nothing to do with  
8 this. Limine has nothing to do with this.

9 The question was asked and answered. You didn't  
10 come up and say, Judge, they violated the motion in limine  
11 here, did you?

12 MR. ANDRE: No, Your Honor, this was within the  
13 motion in limine. We lost on the motion in limine. We  
14 moved --

15 THE COURT: So -- so --

16 MR. ANDRE: -- to exclude this testimony from  
17 Mr. Douer, anything regarding --

18 THE COURT: So there's -- there's no objection  
19 here to relevance, is there?

20 MR. ANDRE: No, Your Honor, there's not.

21 THE COURT: Okay.

22 MR. ANDRE: Your Honor, and I guess I'm catching  
23 the tone from Your Honor, so I won't waste too much more of  
24 your time on this, but I do want to say that they  
25 continue -- repeatedly argued the irrelevant issues to the

1 jury about the abandonment issue. You did give a curative  
2 instruction, but they nonetheless continued to argue it.

3 And they also continued to bring up the fact that  
4 this was filed years after, which I think Your Honor,  
5 obviously, has already decided that that's -- would have  
6 been relevant. We don't think it's relevant. We think we  
7 played within -- by the rules.

8 THE COURT: What I want you to focus on, because  
9 of the allegations that you made, is any evidence that you  
10 have that the lawyers on behalf of Amazon took -- took --  
11 did anything during the course of trial that was the basis  
12 of anyone on Freshub's ethnicity or heritage or race or  
13 anything like that.

14 I want you to focus on whatever you have. Because  
15 I'll tell you, when I got that, I was extremely offended by  
16 these allegations. And why? Because it intimates that I  
17 would have, as a trial judge, allowed that kind of evidence  
18 to come in and not done anything about it, which means  
19 you're alleging that I'm complicit in it.

20 And I went -- I've gone back everything I can do  
21 to remember if there was any moment where, first, I thought  
22 anything inappropriate was said. I don't.

23 But, number two, was there any moment where you  
24 did -- you did what you were supposed to do, which was  
25 object to it during the course of the trial? If something

1 had been said, we could have addressed it. If necessary, I  
2 could have given a curing objection. None of that. This  
3 issue was never raised during trial, not once.

4 And so I want you to tell me what happened during  
5 trial that was inappropriate that Amazon -- that Amazon did  
6 and your basis for making the allegations that you did,  
7 because they're serious.

8 And, you know, I'm not certain that I don't have  
9 to take some action with respect to you making these kind  
10 of allegations against them if they're unfounded.

11 So this is your chance to -- to -- to explain to  
12 me why you would make these kind of allegations against  
13 Amazon and their lawyers, and me, since I was sitting  
14 there, and I also took no action.

15 MR. ANDRE: Your Honor, let me be very clear here.  
16 This is not any allegations against the Court. And maybe I  
17 should have objected. Let me be very, very clear here. We  
18 don't think the Court was complicit in this at all. We  
19 think most of this happened in the closing argument. We  
20 think it was tied together. And maybe -- it's been always  
21 my policy, it is argument. And --

22 THE COURT: Tell me anything -- any place where  
23 the lawyers for Amazon did any -- asked a question, put on  
24 evidence, did anything that is the foundation for your  
25 argument that you deserve a new trial because of

1 inappropriate ethnic or heritage comments or evidence that  
2 was put in.

3 MR. ANDRE: Your Honor, I think the majority of  
4 our brief was -- was focused on that we needed a new trial  
5 because of the attack on the Constitution.

6 THE COURT: Mr. Andre, I'm going to give you one  
7 more chance.

8 MR. ANDRE: What I'm saying, but with respect to  
9 the -- I think our brief, we made it very clear, they asked  
10 questions that were -- in the closing argument -- they  
11 asked about the money, the situation of how much money the  
12 inventor would make.

13 THE COURT: And what -- how is -- how does that  
14 relate to his ethnicity or his heritage?

15 MR. ANDRE: Well, Your Honor, I don't --

16 THE COURT: I haven't had a trial where the  
17 person -- someone has been asked how much money they're  
18 going to make. And it goes -- that's -- so I want you --  
19 this is your last chance because we're going to move on.

20 You've made incredibly harsh accusations against  
21 the lawyers. And I'm always reminded of -- there was  
22 someone who -- a political person who said: Where do I go  
23 to get my reputation back?

24 If you are, on behalf of your client -- and this  
25 goes to every lawyer on your team that signed off on this

1 by filing of the pleading in my Court that intimates that  
2 anyone on behalf of Amazon or Amazon did anything that was  
3 inappropriate because of your client's ethnicity or  
4 heritage or race, this is your chance to tell me what that  
5 was. Because, again, I'm taking it -- I'm taking -- if you  
6 are unsuccessful in persuading me, I'm taking very  
7 seriously into consideration what I have to do in response  
8 to your having filed this kind of motion.

9 MR. ANDRE: Your Honor, let me start by saying,  
10 this is -- the buck stops with me, and this is on me. So  
11 Paul Andre is the guy that you need to -- to direct any  
12 attention to. The team -- this is my call.

13 Second, the information we provided in our brief,  
14 I think, was such that the -- the question of coming to the  
15 courthouse and cooking up a scheme to get rich and the fact  
16 of how much money they were making, I think that is a --  
17 once again, it was not meant to be any type of  
18 anti-religious or anything else, it was just plain old  
19 cultural stereotypes.

20 That being said, the closing argument, I think, is  
21 very telling. I think that's something maybe I should have  
22 objected. I thought it was too late to do so, maybe it was  
23 the wrong tactic. But the closing argument was very  
24 telling.

25 The assault on the patent system, the assault on

1 the fact that these people are coming to here, and this is  
2 the tip of the iceberg, this was a company coming in to get  
3 rich and go after all U.S. companies. I think that is  
4 something that you cannot -- you should not be able to say  
5 in closing arguments.

6 I cannot for the life of me figure out why those  
7 type of statements were made, and -- and obviously -- and,  
8 Your Honor, this was -- it was in the heat of the moment.  
9 I probably should have objected, but as a policy, I didn't.  
10 Closing arguments, they are arguments, and I didn't make  
11 any such -- didn't make any such objection. I'm sorry now  
12 that I didn't.

13 THE COURT: Is there anything else you wanted to  
14 add in support of your motion?

15 MR. ANDRE: Your Honor, I think I've said what I  
16 came -- said what I had to say, so...

17 THE COURT: Mr. Hadden, who's going to argue this  
18 on behalf of Amazon?

19 MR. HADDEN: Your Honor, I was going to argue the  
20 JMOL and non-infringement, if I could, at first. If you'd  
21 you rather hear my new trial motion, my partner, Saina  
22 Shamilov, will handle that.

23 THE COURT: Yeah, I'd like a response to what  
24 Mr. Andre just said, if that would be okay.

25 MR. HADDEN: Go ahead, Ms. Shamilov.

1 MS. SHAMILOV: Thank you, Mr. Hadden.

2 Good morning, Your Honor. Saina Shamilov on  
3 behalf of Amazon.

4 This is a difficult argument for me because the  
5 allegations -- I submitted a declaration of my background,  
6 and the allegations that were made hit right in my heart.

7 At no point during trial did anyone on our team  
8 raise any Jewish stereotypes, mention Judaism, any  
9 religious affiliations of anyone, or presented anything  
10 that the Waco community would interpret as a dog whistle,  
11 right? What -- on the cultural stereotypes, there was  
12 absolutely nothing in the record.

13 Now, that the company was from Israel is a fact.  
14 Freshub's counsels -- counsel themselves offered that to  
15 the jury, right? Repeatedly, through multiple examinations  
16 of witnesses, the Israeli affiliation was put in by  
17 Freshub's counsel to the jury.

18 Now, the issues that Paul Andre, Mr. Andre just  
19 raised as supposedly attacks on Jewish stereotypes were not  
20 that at all, right? They were -- just as Your Honor just  
21 noticed, they were about biases, they were about why  
22 someone who has an interest and control was not there and  
23 dodged service, right? They were about facts directly  
24 relevant to the issues in the case that the jury had to  
25 resolve.



1           And the filing of this brief alleging an  
2   incredibly serious -- right? These are very serious  
3   allegations -- not only tarnished, you know, or went to our  
4   representation, but they were actually picked up by press,  
5   including a very reputable Jewish publication. The  
6   title -- it's titled with anti-Semitism in it, mentioning  
7   me personally as someone involved who was cross-examining a  
8   witness and was talking about financial statements, making  
9   sure that the jury understood that the figures were not in  
10   dollars but in shekels, right?

11           The consequence of this brief is not just asking  
12   for a new trial. The consequence of this brief is  
13   affecting reputation personally of the lawyers of our team  
14   that went beyond just the filing. It's now out there --

15           THE COURT: My recollection -- help me on this.  
16   My recollection was that the reason that the  
17   dollars/shekels issue came up is because one of the  
18   document -- something you-all were talking about had to do  
19   with a number, and you -- that you-all were simply letting  
20   the jury know that you had to -- I think they were in  
21   shekels, and they had to be translated into dollars.

22           But it was -- it was nothing more -- it could have  
23   been pesos or yen, but it happened to be shekels because  
24   that's the form that that money was in. That was my  
25   recollection of it.

1 MS. SHAMILOV: That was exactly that, Your Honor.  
2 Those were financial statements -- yearly financial  
3 statements that included figures, profits, losses, right,  
4 revenue generated, and they were just numbers, and the jury  
5 needed to know what these numbers are, right? I mean,  
6 otherwise, you think four million is \$4 million instead  
7 of --

8 THE COURT: Right.

9 MS. SHAMILOV: -- something different. That was  
10 the only reason that question was asked, right?

11 THE COURT: That was -- that was my recollection,  
12 as well. I just wanted to confirm.

13 MS. SHAMILOV: That's exactly it, Your Honor.

14 And -- and you've already alluded to that when  
15 Mr. Andre was talking, but if you look -- read their brief  
16 with respect to new trial, this -- there were so many wrong  
17 things that we've done, right?

18 And -- and Mr. Andre again said it started at  
19 opening all the way through the closing. And not once, not  
20 once did they object on the basis that they raised the  
21 wrongs were made in their brief, right? There was not a  
22 single objection on "us versus them," which was absolutely  
23 not the theme that was put by us. There was no objection  
24 on us drawing Jewish stereotypes, cultural stereotypes, any  
25 of that, right?

1 I mean, if you're -- to me, if you're a lawyer  
2 representing counsel -- you know, client, and someone does  
3 something that you think is a dog whistle, you'll be up  
4 immediately objecting to it, right? You wouldn't just sit  
5 there and then only object or raise the issue after the  
6 jury went against you, right?

7 None of the -- not a single objection was made on  
8 the basis that they say we've committed the wrongdoing so  
9 egregious that requires a new trial, so egregious --  
10 because they acknowledge the objection was not made -- that  
11 it violated the integrity of our legal system and of this  
12 Court, and the only remedy is a new trial, right? That was  
13 just not the reality that took place during the trial.

14 I can go on, Your Honor, and address individual  
15 statements that Paul Andre -- Mr. Andre put on, and I  
16 apologize for the emotional response. It just became very  
17 personal.

18 THE COURT: Here's the way I see it. The attack,  
19 as you just noted, was against you-all. And -- and like I  
20 said, I -- I took it the same way against me. And the idea  
21 that you-all would have been allowed to make these -- I  
22 guess sometimes if you're not the dog, you don't hear the  
23 dog whistle, but, you know -- because I certainly heard  
24 nothing during the course of the trial that I -- I mean, I  
25 was paying attention. I remember the discussion about

1 having to say it was shekels and -- and all that, but I  
2 remember nothing that was in any way anti-Semitic,  
3 anti-Israel, anything.

4 And -- and so I'll take Mr. Andre at his word that  
5 that wasn't what they intended. But since the attack was  
6 against you and your firm, you certainly -- you are welcome  
7 to say whatever you care to. You don't need to, probably,  
8 but if you feel it'd be better for you to say anything else  
9 to get it on the record, I'm happy to give you whatever  
10 time you want to respond.

11 I'm also happy for you to pass -- to pass the  
12 microphone back to Mr. Andre and get this -- and we can  
13 move on from this motion.

14 MS. SHAMILOV: I don't think I need to say  
15 anything more, Your Honor, on the new trial.

16 THE COURT: Mr. Andre, anything else on the new  
17 trial?

18 MR. ANDRE: Nothing on it, Your Honor. I just  
19 want to say that there was no -- it was never meant to be a  
20 personal attack on any individual lawyer at Amazon, or  
21 obviously, as I said earlier, I have nothing but respect  
22 for the -- Your Honor and the Court and --

23 THE COURT: Well, how would you -- Mr. Andre, if  
24 the tables were turned and -- and this motion had been  
25 filed against you and your firm, how would you have taken

1 it? Would you not have taken offense?

2 MR. ANDRE: Probably not, Your Honor, to be candid  
3 with you, just because I've been called everything under  
4 the sun by opposing counsel. So I don't take this very  
5 personal.

6 THE COURT: Okay.

7 MR. ANDRE: Just -- that's just who I am maybe. I  
8 thought this was an issue where the evidence was so  
9 powerful -- I mean, as I sit through this trial, I watched  
10 witnesses perform, I cannot explain the -- the jury  
11 verdict. I just simply can't explain it because the  
12 evidence was so overwhelming.

13 And so the -- the thought that the theme of the  
14 case was an "us versus them" I thought was very clear. It  
15 was never meant to be anything about anti-religion or  
16 anti-Semitic. And to the extent that was taken, we tried  
17 to clear it up in the reply report. We -- if anyone took  
18 it that way, I do apologize, and it was not my intent.

19 It was simply to say that there were -- you know,  
20 there are issues that came up at trial, and maybe we should  
21 have objected more vigorously and not relied simply on the  
22 good graces of the Court.

23 So I do apologize if Your Honor took any offense  
24 whatsoever. That brief, it was clearly not meant to insult  
25 the Court or Your Honor, to say you were complicit. It was

1 just an attempt to explain how a jury in Texas could have  
2 found non-infringement given the record that was before it.

3 THE COURT: I'll be back in a few seconds.

4 MR. ANDRE: Thank you, Your Honor.

5 (Pause in proceedings.)

6 THE COURT: The Court is going to deny the motion  
7 for new trial filed by the Plaintiff. We'll get a more  
8 robust order out hopefully fairly quickly on that.

9 The next motion is -- and I'm also denying the  
10 JMOL with respect to the fact that there was of evidence of  
11 infringement.

12 I think -- help me out, Mr. Hadden, if I have it  
13 right, if my clerk did me right, the -- the next motion is  
14 yours for 101; is that correct?

15 MR. HADDEN: Yes, Your Honor.

16 THE COURT: And is there anything -- let me bounce  
17 back just for a second to Mr. Andre or Mr. Palmer.

18 Is there anything else we need to take up behalf  
19 of the Plaintiff?

20 MR. ANDRE: No, Your Honor, just the -- the JMOL  
21 and the motion for new trial. You covered everything.  
22 Thank you. I appreciate your time.

23 THE COURT: You bet.

24 Mr. Hadden?

25 MR. HADDEN: Yes, Your Honor.

1           So these patents are ineligible under 101 as a  
2 matter of law. The claims recite only generic instructions  
3 for achieving functional results, receiving a digital  
4 order, translating the spoken order to text, and then  
5 identifying or matching text to identify an item.

6           At this point, Your Honor, you know, those claims  
7 that are generic and functional fail under both Step 1 and  
8 Step 2. There has been no waiver in this case. Freshub's  
9 argument that this was a jury issue and, therefore, was  
10 subject to the deadline triggered by the verdict rather  
11 than through a judgment is not correct.

12           Of course, patent ineligibility is a question of  
13 law, not a jury issue. Both Step 1 and Step 2 are  
14 questions of law, not jury issues. So that limit doesn't  
15 apply.

16           And then with respect to the jury's failure to  
17 fill out the verdict form on the conventionality questions,  
18 that is not a waiver of the ultimate issue of patent  
19 ineligibility. It does prevent Your Honor or us asking  
20 Your Honor to enter facts that the jury was asked to find  
21 in that verdict form. But Amazon's position has been since  
22 the beginning of this case, when we filed our motion to  
23 dismiss and also at summary judgment, that this is not a  
24 case in which auxiliary fact-finding by the jury was  
25 required to determine the 101 issue.

1           This is a case where the patents are ineligible on  
2 their face based on the intrinsic record. And so those  
3 findings are not required to reach the ultimate issue that  
4 the patents are ineligible.

5           THE COURT: I couldn't tell, Mr. Hadden, if you're  
6 finished.

7           MR. HADDEN: I'm finished, Your Honor.

8           THE COURT: Okay. Thank you, sir.

9           A response, Mr. Hannah?

10          MR. HANNAH: Yes, Your Honor. Thank you.

11          Your Honor, there's absolutely waiver in this  
12 case. Rule 50(b) is relentless. It specifically requires  
13 Amazon to file within 28 days on an issue that the jury did  
14 not decide. The case law is clear, if you're a day late,  
15 you're too late. And that's -- that's just the way that  
16 the federal rules read. So there's absolutely a waiver  
17 because the motion was filed late. It was filed three  
18 weeks late, and we can't get around 62 of the federal  
19 rules.

20          And, furthermore, this is a classic case of  
21 waiver. We all sat in the courtroom in which the -- Your  
22 Honor read the verdict, and there was a blank space on  
23 Question 3. And we all looked over, and Your Honor gave  
24 Amazon's a chance -- counsel a chance to send the -- send  
25 it back.



1           And so we looked over. They talked about it.  
2       There was a pause. Everyone was silent in the courtroom.  
3       And they looked at Your Honor, and they said: It's fine.  
4       We're just going to let it stand.

5           That is textbook waiver. They're sitting there.  
6       They considered it. Your Honor gave them an opportunity to  
7       address it right -- right then and there, and they said:  
8       No, thank you.

9           And so that right there is dispositive of the  
10      issue. The question went to the jury. It was not  
11      answered, and they did nothing about it. They waived their  
12      right to be heard on the 101 issue.

13          And then we get their motion. And even setting  
14      aside the waiver issues, they don't even address Step 1 in  
15      the motion. They just assumed that Your Honor had granted,  
16      when there's no order, there was nothing about that. So  
17      they were required to put an analysis under Step 1 in their  
18      opening brief, and they failed to do so.

19          Looking at the patents, they do not describe an  
20      abstract idea. You can look at, for instance, the '810  
21      patent, Claim 1 talks about a distributed system, a voice  
22      processing system. It teaches you exactly how to form this  
23      system with a network interface, a computer. It tells you  
24      exactly what to do. You associate a unique identifier with  
25      the remote system. It tells you how you're going to

1 process this. And then you send it to the back end.

2           And then the back-end system, it also describes --  
3 it tells you exactly what the components are and how you're  
4 going to do this. In terms of receiving the -- the order,  
5 you're going to do something with that. And here in the  
6 '810 patent, you translate only a portion of that to text.  
7 You use that text to do something. It tells you what to do  
8 to identify an item.

9           Then what are you going to do after you identify  
10 that item? You're going to associate it with a user, and  
11 you're going to enable it to be displayed on a -- on a  
12 device. And then you're going to send it to an item  
13 provider.

14           So it tells you exactly what the system is, what  
15 the components are, and how you're going to do that, which  
16 is not an abstract idea. This is -- it's a concrete  
17 solution.

18           And then, furthermore, when we get to Step 2,  
19 which Your Honor knows we don't need to get to if we get  
20 past Step 1, but Step 2, again, was not fully -- was not  
21 fully addressed.

22           For No. 1, again, there's a factual finding --  
23 there's no factual finding from the jury that this was  
24 not -- that this was a conventional technique. And, in  
25 fact, the jury's verdict confirmed that it was not

1 conventional, and that they found that the patents were  
2 valid over all the different components and the testimony  
3 that they found that was offered during -- during the  
4 trial.

5           The Defendants, in their brief, again, they don't  
6 even address the ordered combination of the elements and  
7 how those interplay together. And they don't specifically  
8 address each claim and all of the elements, which is what  
9 Your Honor has told the -- told Amazon they needed to do  
10 time and time again throughout this case.

11           And so there's just a complete lack of proof and a  
12 lack of analysis, particularly in -- in their motion.

13           And then I think finally is, you know, this  
14 argument that they say that this technology preempts  
15 everything, but then they also argued that there are --  
16 their system does not infringe.

17           I think that cuts against them on their argument,  
18 and specific -- specifically with regard to Step 2 and  
19 there being this idea that there's a preempt --  
20 preemptive -- that it's going to cover all technologies  
21 related to voice processing.

22           There's a specific system and a specific order,  
23 and that's what the Court -- that's what the jury found in  
24 their validity finding, and -- and we don't have a verdict  
25 from the jury finding otherwise.

1 Unless Your Honor has any -- any questions --

2 THE COURT: I don't.

3 Mr. Hadden?

4 MR. HADDEN: Yes, Your Honor. I'm not going to  
5 address the merits of the 101 analysis. Again, we've  
6 briefed that a couple times to Your Honor. I'm not going  
7 to waste your time on that.

8 Of course, our view is that this is a case where  
9 the intrinsic evidence alone is dispositive. So there was  
10 no need for the jury fact-finding that they didn't make,  
11 and so the legal issue is preserved.

12 And the -- Rule 50(b), this is not a jury issue.  
13 The jury was not asked to decide either ineligibility  
14 overall or even the Step 2 issue of whether there was an  
15 inventive concept. There is just a special verdict to  
16 answer this specific factual question regarding  
17 conventionality. That's not required for a finding of  
18 ineligibility in this case, Your Honor.

19 THE COURT: I'll be back in just a second.

20 MR. HADDEN: Thank you, Your Honor.

21 (Pause in proceedings.)

22 THE COURT: The Court's going to deny Amazon's  
23 motion.

24 And I believe that's all that we have for this  
25 morning; is that correct?

1 MR. HADDEN: Yes, Your Honor.

2 MR. HANNAH: Yes, Your Honor.

3 THE COURT: Thank you -- I'm sorry, Mr. Andre, is  
4 that everything we have?

5 MR. ANDRE: It is, Your Honor. Thank you for your  
6 time.

7 THE COURT: Thank you.

8 MR. HADDEN: Thank you, Your Honor.

9 THE COURT: Thank you-all.

10 MS. SHAMILOV: Thank you, Your Honor.

11 THE COURT: Hope to see you-all again. Take care.

12 (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes  
SHELLY HOLMES, CSR, TCRR  
CERTIFIED SHORTHAND REPORTER  
State of Texas No.: 7804  
Expiration Date: 10/31/2021

10/22/2021  
Date